REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 11 OF 2015

LOCAL BUILDING AND

CONSTRUCTION LIMITED.....1ST PLAINTIFF/RESPONDENT

VERSUS

INSTITUTE OF THE BLESSED VIRGIN

MARY LORETO MSONGARI.....1ND DEFENDANT/1ST APPLICANT

EPHIGENIA W. GACHIRU.....2ND DEFENDANT/2ND APPLICANT

FERUZZI LIMITED.....3RD DEFENDANT

RULING

Upon Reading an application dated 19th November, 2018 filed under a Notice of Motion brought under Sections 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, order 2 Rules 15 (b) (c) (d) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, the supporting affidavit, the replying affidavit and the rebuttal thereto and Further Upon Hearing both Counsels for and against the Application for Orders:

a) ***That this case be struck out and or dismissed***

b) ***Costs of the suit be provided.***

The Application is premised on the grounds that this suit was filed by the Respondent in the year 2015 and the Respondent has so far amended the Plaint twice, to wit, in 2016 and a further amendment in October 2018 and that the Respondent/Plaintiff has filed this suit against the 1st Defendant/ 1st Applicant (the institute of the Blessed Virgin Mary, Loreto Sister (Msongari) as registered Trustee erroneously.

Further grounds are that the 1st Defendant/1st Applicant is actually not a Trustee but a Society exempted from Registration. The rightful persons therefrom to be sued are the officials of the society, the Plaintiff/Respondent has not been diligent in its efforts to file this suit as it appears it has not conducted any search before filing this suit, the 2nd Applicant/2nd Defendant is not a Trustee of the 1st Defendant nor is she an official of the 1st Defendant and lastly that this suit as filed is vexatious an abuse of Court process, scandalous and frivolous and may prejudice embarrass or delay the fair trial of the action.

The Application is further supported by the Supporting Affidavit of Ephigenia W. Gachiri who deponed that the Respondent the Respondent has not been diligent in commencing this suit which has been amended twice as it does not seem to have done any search to establish the true identities of the Parties herein and does not seem ready to so in the near future.

In opposition to the Applicant's Notice Motion herein, the Respondents filed a Replying Affidavit sworn by John Gatonye Gitau on the 5 th October 2018. He averred that the application is misconceived and an abuse of court process. He stated that the suit was brought against the correct parties (The institute of the Blessed Virgin Mary Loreto Msongari) as described in the contract between the plaintiff and 1st respondent; and Ephigenia W. Gachiri who executed the contract on behalf of the 1st defendant. It was asserted that the misdescription of the 1st and 2nd defendant in the amended plaint is an error does not warrant the striking out or dismissal of the suit.

He resorted to Order 1 rule 9 of the Civil Procedure Rules pointing out that the same protects the Plaintiff herein against dismissal for his misjoinder or non-joinder of the parties and gives this honourable court the discretion to deal with the dispute between the parties.it was asserted that the amendments done by the Plaintiff were done with leave of court through formal applications brought under order 8 rule 3 of

the Civil Procedure Rules and are necessary to enable this court make a proper finding in the case and striking out of the suit at the stage would visit injustice upon the Respondent herein. He further asserted that order 1 rule 10 of the Civil Procedure Code Rules 2010 vests on this honourable court the power to remedy the error in the plaint. Lastly he deponed that the suit is not an abuse of court process as it discloses a reasonable cause of action against the defendants.

ANALYSIS AND DETERMINATION

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter.

The main issue I need to decide is whether the suit ought to be struck out or whether it may be cured by amendment. Counsel for the Respondent sought relief under Order 1 Rule 9 and 10. These two provisions stipulate as follows: -

> *Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*
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> *Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*
>
> *(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*
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> *(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.*
>
> *(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.*

The above rules have been applied in the decision of F. Gikonyo J. in ***ZEPHIR HOLDINGS LTD VS MIMOSA PLANTATIONS LTD, JEREMIAH MAZTAGARO AND EZEKIEL MISANGO MUTISYA (2014) eKLR,*** where he held that:

> ***"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."***

The Court of Appeal in ***WILLIAM KIPRONO TOWETT & 1597 OTHERS VS FARMLAND AVIATION LTD & 2 OTHERS (2016) eKLR*** held that:

> ***"…Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."***

This is further supported by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice. The said article stipulates that:

> ***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."***

In the **case of *REPUBLIC VS. DISTRICT LAND REGISTRAR, UASIN GISHU & ANOR (2014) EKLR* where Justice Ochieng held that:**

> ***".. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."***

In ***RAILA ODINGA VS IEBC AND 4 OTHERS PETITION NO. 5 OF 2013*** by the **Supreme Court** comes to live on whether or not, in the prevailing circumstances of this case, I can apply *Article 159(2)(d) when it pronounced thus:*

"The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome"

Order 1 rule 9 and Article 159 is intended to ensure that each party is afforded a fair trial guaranteed under **Article 50 (1)** of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why **Article 159(2) (b)** of the Constitution provides that justice shall be administered without undue regard to technicalities. When case is decided in accordance with substantial justice as depicted under the abovementioned article, justice will not only be seen but will be seen to have been done.

It is not in dispute that there exists a misjoinder. The Applicant suggested that for that reason, the whole case should be struck out and dismissed. The above provisions that I have cited suggest otherwise. A misjoinder of parties to a suit cannot defeat the whole case. In the premises, I go by order 10 rule 2 as read together with 4 which I think they are of utility to this suit. These provisions give the Court discretion to order the name of a party improperly joined, whether as plaintiff or defendant struck out and the name of any person who ought to have been joined, added.

I'm inclined to comment on the behavior of the Applicant herein, as far as this application is concerned. The applicant brought this Application seeking orders of to strike out or dismissing the main suit on the basis that 1st and 2nd defendants have not been properly described in the plaint. All along the Applicants were aware of this error but they never alluded to it. Article 50(2)(j) applies mutatis mutandis to civil litigation. The aforementioned constitutional provision imposes a duty of disclosure of all the evidence, material and witnesses to the opposing parties during the pre-trial stage and throughout the trial. Thus, the obligation to disclose is a continuous one, arising pre-trial and continuing throughout the trial and is to be updated whenever additional information is received. In an open and democratic society of our type, courts cannot give approval to trial by ambush, and in both civil and criminal litigation the courts cannot adopt a practice under which any of the parties be ambushed. The nature of the fundamental right to a fair hearing requires that there be equality between the contestants in litigation.

In Article 50 the corner stone of any civil justice system is the principle of equality and fairness between the parties. The principles of our civil justice system as I understand them is and as articulated in section 1A and 1B of the Civil Procedure Act is founded on the following pillars:

(a) Regulating access to court and to justice

(b) Ensuring the fairness of the process

(c) Re-establishing a speedy and effective process

(d) Achieving just and effective outcomes

There is no greater complaint in regard to our administration of justice than the technicalities of procedure. At the very onset of the new constitution 2010 under Article 159(2) (d) substantive justice is given prominence to technicalities of procedure.

There are probably key principles under Article 10 of the Constitution aimed at not to make the administration of justice a legal fiction i.e. the principles of equity and equality, integrity, transparency and accountability. The all-important requisite to the vindication of the rights of the individual citizens as anchored in Article 50(1) is a court of justice able to do justice and to do it expeditiously with the right to access stated in Article 48 in mind.

A cumbersome and legal procedures which represses and weakens the right to access justice to any individual should be considered as running counter to the right to a fair hearing. Unless there is a fundamental question on the jurisdiction of the court or tribunal the litigant should fully have his or her day in court and fairly tried with least possible encumbrances.

With regard to the notion of equality of arms no litigant or party to a court proceeding should be denied an opportunity to present his or her case by the opponent on grounds that certain procedural aspect of the trial has not been complied with fully.

In the instant case the plaintiff should not be penalized for the errors of mis-description of his opponents to the dispute. Also in the same vein I found it a violation of non-disclosure principle by the defendant counsel which led to the lost opportunity for the amendment of pleadings to deal exhaustively with the issues in this notice of motion.

The motion challenging the legality of the proceedings on misjoinder of the defendant did not attack the subject matter jurisdiction of the claim. In a nut shell what the defendant is looking for in such a motion for judgement on the pleadings is winning the case without a trial. The issue of the power to strike out pleadings came up for consideration. In **Halsbury's Laws of England 4th Edition at paragraph 45—455** which states as follows:

"…the powers are permissive…and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading…Where a pleading discloses no reasonable cause of action…it would be ordered struck out or amended, if it is capable of amendment…No evidence including affidavit evidence is admissible on an

application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed…However, summary procedure…will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable…Nor will a pleading be struck out where it raises an arguable, difficult or important point of Law."

These principles augur well for the sustenance of pleadings and fair administration of justice. In light of the foregoing, I hold the view that the Applicant herein failed to comply with statutory duty of disclosure and discovery when they withheld the fact on misjoinder which they were well aware of at the time of filing the suit. In that regard this court cannot allow the Applicant herein to benefit from their own mischief.

In the premises, I am persuaded by the argument of the Plaintiff in particular, I concur that the provisions of Order 1 Rule 9 do except defeat of a suit for misjoinder or non-joinder. Accordingly, I decline to strike out the suit on that ground as, in any event, an amendment to the plaint can easily cure that defect.

I would therefore dismiss this notice of motion and in the circumstances of this case order the plaintiff to amend the plaint to give a proper description of the legal entity in the name and style of the defendant. That upon amendment of the claim to serve the new pleadings on or before the 18/2/2019. That the defendant is also permitted to file an amended defence of the claim within 5 days of being served with the process. The matter do proceed for hearing on a priority basis as earlier scheduled by the parties under the case management directions of this court. Costs of this application be borne by the defendant. Leave to appeal is declined.

The upshot is that the motion fails for lack of merit and is hereby dismissed with costs.

It is do ordered.

Dated, Delivered and Signed at Kajiado this 7th day of February 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Mwaura holding brief for Mr. Chiuri for the Plaintiff

Mr. Ochieng holding brief for Mr. Maranga for the applicant